UNITED STATES
v.
LOUIS L. OSMER, JR., ET AL.

IBLA 83-224 Decided September 21, 1983

Appeal from decision of Administrative Law Judge Robert W. Mesch declaring millsite claims invalid. NM 312.

Affirmed.

1. Millsites: Generally -- Millsites: Determination of Validity

Sec. 15 of the Act of May 10, 1872, 30 U.S.C. § 42 (1976), requires that a millsite be used or occupied for mining or milling purposes. The use of improvements on millsites as a base for occasional sampling or testing activities on associated patented lode claims and the intent to use the millsites in the future, when and if market conditions are favorable, do not satisfy the statutory requirements.

APPEARANCES: John W. Reynolds, Esq., Silver City, New Mexico, for appellants; Demetrie L. Augustinos, Esq., Albuquerque, New Mexico, for appellee.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Louis L. Osmer, Jr., Raymond J. McCoun, John H. Dogendorf, and Mary Louise Osmer have appealed the November 10, 1982, decision of Administrative Law Judge Robert W. Mesch declaring the Austin, Bull Dog, Amazon, and Pacific Nos. 1, 2, and 3 millsite claims invalid. 1/ The Judge held that the millsites were not presently used or occupied for mining or milling purposes in connection with associated lode claims; that any use or occupation of the millsite claims was in connection with prospecting or exploration activities on the associated lode claims; and that the associated mining claims were not presently valuable for mining purposes, but, only as an exploration target.

1/ The millsites are located in the S 1/2 sec. 36, T. 19 S., R. 16 W., New Mexico principal meridian, within the Gila National Forest, Grant County, New Mexico.

The New Mexico State Office, Bureau of Land Management (BLM), on behalf of the Forest Service, U.S. Department of Agriculture, issued a contest complaint dated October 14, 1981. The complaint alleged that the land was not being used or occupied for mining or milling purposes in connection with associated lode or placer mining claims nor used or occupied for mining or milling purposes by the owner of a quartz mill or reduction works.

Contestees denied the charges and on May 18, 1982, a hearing was held before Judge Mesch in Silver City, New Mexico.

[1] We have thoroughly reviewed the record of this case and the arguments advanced by the parties. Judge Mesch's decision issued on November 10, 1982, set out a full summary of the testimony, the relevant evidence, and applicable law. We agree with the Judge's findings and conclusions and adopt his decision as the decision of the Board. A copy of the Judge's decision is attached.

In the statement of reasons for appeal, appellants contend generally that the evidence discloses that these millsites conform to the requirements of 30 U.S.C. § 42 (1976) in that they are used by the owners for mining and milling purposes. Appellants specially argue without elaboration that the Administrative Law Judge erred in not finding that these millsites are used for mining or milling purposes, pursuant to the language of Hartman v. Smith, 7 Montana 19, 14 P. 648 (1887), and Valcalda v. Silver Peak Mines, 86 F. 90 (9th Cir. 1898).

Both of the cases cited by appellants interpreted section 2337 of the Revised Statutes of the United States. That provision is now codified as 30 U.S.C. § 42 (1976). In Hartman, supra, the Supreme Court of Montana held that a millsite upon which the owners had erected a cabin used for storing tools and as an ore house for ore taken from the mine was used and occupied for mining or milling purposes. In Valcalda, supra at 91, the Circuit Court of Appeals for the Ninth Circuit found that:

> Long prior to the date when the mill site was located, the land included in the application had been occupied by the Locator's predecessors in interest; and a house, a stockade stable, and a corral had been built upon said premises, and a road had been graded therefrom to the mines of the corporation, at a cost of between ten and fifteen thousand dollars. From the time of its location of said mill site, the corporation had made use of the water of the springs by hauling it in wagons a distance of four or five miles, for use at the mines, for its employees, and for culinary purposes. The only way in which mine owners in that vicinity could obtain water for use in their mines was by hauling it or packing it from springs, and it was the custom of miners in that district to locate springs of water in connection with their mines.

The court stated further that "[t]he premises in question were clearly necessary to the proper operation of the plaintiff's mines. They were as much used for mining purposes as if they had been used for a dumping place for tailings or as a site for mill machinery." Id. at 93. Citing Hartman, the Ninth Circuit held that the use and occupancy was sufficient possession of the millsite to maintain an action of ejectment.

In this case three of the millsites contain improvements, including a house, a corral, a garden plot, and a storage shed on the Amazon claim; a well and a wellhouse on the Pacific No. 1 claim; and a watertank and part of a waterline on the Austin claim. Apparently, appellants believe that such improvements are sufficient to establish use or occupancy for mining or milling purposes on the basis of the cited cases. 2/ Those cases, however, are easily distinguished from the present case. In both of the cases there were actual mining operations under way on the associated mining claims. In the present case appellants have shown no use on the claims related to any ongoing mining or milling operation. The patented lode claims have been in a state of inactivity, except for various testing and sampling conducted in the 1950's (Tr. 46-48), 1977 (Tr. 48-49), and in May 1982 (Tr. 49). Appellant Osmer also testified that he was involved in mill construction on the mining claims in 1979 and 1980. The mill is portable and was not on the mining claims at the time of the hearing (Tr. 48-49). Although, appellants have expressed the intent to mine in the future, there is no present mining operation on the lode claims. The use of improvements on a millsite as a base for occasional sampling or testing activities on associated patented lode claims and the intent to use the millsite in the future when and if market conditions are favorable, do not satisfy the requirements of use or occupancy set forth in 30 U.S.C. § 42 (1976). See United States v. Wedertz, 71 I.D. 368 (1964).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, we affirm the decision of the Administrative Law Judge and adopt it as our own.

Bruce R. Harris
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Edward W. Stuebing
Administrative Judge

2/ Louis L. Osmer, Jr., testified that in the past water from the millsites has been used on the mining claims during certain drilling operations. He stated that although there is water on the patented claims, that water is not potable (Tr. 58-59).

November 10, 1982

UNITED STATES OF AMERICA,	:	NEW MEXICO 312
	:	
Contestant	:	Involving the Austin, Bull Dog, v.
	:	Amazon, and Pacific Nos. 1, 2 and
:	3 millsite claims located in S1/2 LOUIS L. OSMER, JR.,	: Of Sec. 36,
T. 19 S., R. 16 W., RAYMOND J. McCOUN,	:	NMPM (within the Gila National JOHN H.
DOGENDORF, and	:	Forest), Grant County
MARY LOUISE OSMER,	:	New Mexico.
	:	
Contestees	:	

DECISION

Appearances: Demetrie L. Augustinos, Esq., Office of the General Counsel, Department of Agriculture, Albuquerque, New Mexico, for contestant;

John W. Reynolds, Esq., Silver City, New Mexico, for contestees.

Before: Administrative Law Judge Mesch.

This is a proceeding involving the validity of six millsite claims located under Section 15 of the Mining Law of 1872, as amended, 30 U.S.C. § 42. The proceeding was initiated by the New Mexico State Office, Bureau of Land Management, at the request and on behalf of the Forest Service, Department of Agriculture.

Pursuant to 43 CFR 4.451, the Bureau of Land Management issued a complaint on October 14, 1981, charging that the subject millsite claims are invalid because (1) the land is not being used or occupied for mining or milling purposes in connection with associated lode or placer mining claims; and (2) the land does not contain a quartz mill or reduction works.

The contestees filed a timely answer and denied the charges in the complaint. A hearing was held on May 18, 1982, at Silver City, New Mexico. The parties have submitted posthearing briefs.

The millsite section of the mining laws, 30 U.S.C. § 42, provides for two classes of millsites. The first class is a dependent millsite which must be used or occupied by the proprietor of a lode or placer mining claim for mining or milling purposes in connection with a specific lode or placer mining claim with which the millsite is associated. The second class is an independent millsite which must have a quartz mill or reduction works on the land. The owner of a quartz mill or reduction works need not be the owner or proprietor of an associated mining claim. Alaska Copper Company, 32 L.D. 128 (1903); United States v. Wedertz, 71 I.D. 368 (1968); United States v. Cuneo, 15 IBLA 304, 81 I.D. 262 (1974).

The second class of millsite is not pertinent in this case. There is no quartz mill or reduction works on any one of the contested millsite claims. The contestees assert that the millsite claims are of the first class and associated with a group of 15 patented lode mining claims that they own.

The use or occupancy contemplated by the statute with respect to the first class of millsite was explained in Alaska Copper Company, supra, as follows:

> * * * A mill site is required to be used or occupied distinctly and explicitly for mining or milling purposes in connection with the lode claim with which it is associated. This express requirement plainly contemplates a function or utility intimately associated with the removal, handling, or treatment of the ore from the vein or lode. Some step in or directly connected with the process of mining or some feature of milling must be performed upon, or some recognized agency of operative mining or milling must occupy, the mill site * * * to come within the purview of the statute. * * * (at p. 131)

The six millsite claims were located in 1957. They are contiguous, and each claim covers five acres. There is a dwelling house about 44 feet by 44 feet, a storage shed, a corral, and a garden plot on the Amazon millsite. There is a well and a well house on the Pacific No. 1 millsite. A water tank and part of the water line from the well are on the Austin millsite. There are no improvements or other evidence of occupancy on the Bull Dog, Pacific No. 2, and Pacific No. 3 millsites. Other than living in the house and living in a school bus that was moved onto the property, there has been no use or occupancy of the six millsites except for the following activity explained by one of the contestees:

> * * * There has been some jig testing in the dim distant past, I believe about 1957 or '58 which was with a little pilot jig, a little Maytag gasoline engine, and very little weight actually treated, but a valid test at any rate, but that's as close as there actually has been activity to mineral treatment on the mill sites themselves. (Tr. 69, 70)

The millsites are allegedly necessary to supply water, housing, a mill area, and tailings disposal area in connection with the 15 patented lode mining claims owned by the contestees. The mining claims are known as the Austin-Amazon Group.

A report prepared in May of 1982 by a mining consultant employed by the contestees gives the following history of the Austin-Amazon Group of lode mining claims:

> Mining on the property started 100 years ago but most of the mining was conducted during the period of high copper prices associated with World War I. Fifty-nine carloads of high grade ore were shipped to the smelter during this period. This mine, like many others in the district, closed in 1921.
>
> During the period between 1921 and 1956 minimal work was performed on the property and all the old underground workings caved and became inaccessible. In 1956 the Tejano Mining Company leased the property. They and succeeding companies did considerable trenching, sampling and testing, including the development of a small open pit on the northern part of the vein. During the summer of 1956, 1,455 tons of low grade ore were shipped to the Peru Mining Company Mill at Deming, New Mexico and 44 tons of high grade ore were shipped to the smelter. Some drilling was done, an evaluation and report on the property was completed and metallurgical testing was performed. In 1957 operations ceased and the lessors gave up their option.
>
> During the period from 1957 to the present, the owners conducted small scale leaching operations on the property, shipped high grade ore to the smelter and conducted additional sampling and testing of the ore-body. (Ex. No. L, pp. 1 and 2)

In his report, the contestees' consultant recommended the following exploration program:

> The surface exposure of the Austin-Amazon vein is well delineated for some 4,000 feet but little is known on either end or below the surface except in the main shaft area and then only to a shallow depth.
>
> An extensive drilling program needs to be initiated to delineate the present known ore zones and to explore the highly altered but untouched area. The prime targets are those defined by Shockley in 1917 and some of the area in between these targets. This should be done with a series of vertical and angle holes along the strike of the vein system. Most of these holes would be shallow (200 to 500 feet). The main purpose of the drilling would be to delineate ore that could be mined by selective open pit methods and at the same time examine the potential below the pit limits for future consideration [sic]. (Ex. No. L, p. 5)

The contestees' mining consultant expressed the following conclusions in his report:

> The property has some very good target areas that have good potential for developing small orebodies [sic] with a proper exploration program.
>
> If 1,000,000 tons of 1.5% copper can be developed for selective open pit mining, a 200 ton per day flotation mill could be built and the property would be economically feasable [sic] at $1.10 copper.
>
> The mill site claims are necessary for development of the property for providing water and housing personnel. The mill and tailings would have to be located on the present mill site claims or new mill site claims located nearer the mine. Location of the mill can not be determined at this time. (Ex. No. L., p. 8)

The 15 associated lode mining claims have apparently been in existence for 100 years. There is no indication that during that

period of time, they have required the use of additional land as a millsite in connection with the removal, handling or treatment of ore extracted from the claims. The six millsite claims have been in existence for 25 years. During that period of time, they have not been used or occupied for any mining or milling activities in connection with the removal of ore from the associated lode mining claims. As noted in United States v. Cuneo, supra, a millsite claimant cannot perpetually encumber the public lands and prevent their devotion to other public purposes without fulfilling the requirements and purposes of the mining laws.

Giving full credence to the testimony and report of the contestees' mining consultant, the six millsite claims will not be used or occupied to provide an essential and needed mining or milling operation at any foreseeable time in the future unless (1) the contestees can find someone who is willing to invest $225,000.00 in a drilling and exploration program on mining claims that have been the subject of extensive prospecting and exploration over the past 100 years; (2) the drilling and exploration program delineates a sufficient quantity of ore, i.e., in the neighborhood of 1,000,000 tons; (3) the delineated ore is of a sufficient quality or value, i.e, 1.5% copper; (4) the delineated ore is so situated as to be suitable for selective open-pit mining; (5) the selling price of copper reaches a sufficiently high and sufficiently stabilized figure, i.e., an increase from approximately $0.75 a pound to $1.10 a pound; and (6) the present day mining and milling costs estimated by the mining consultant remain constant through future market changes.

The contestees' anticipation, even if warranted, that if and when a sufficiently valuable mineral deposit is found within the associated lode mining claims, the millsite claims will then be used for mining or milling purposes does not meet the requirements of the law. In Hudson Mining Company, 14 L.D. 544 (1892), the Department stated:

> The act clearly contemplates that at the time the application for patent is made, and the entry allowed [or at the time of contest proceedings], the land in question is used or occupied for mining or milling purposes. The act does not contemplate the performance of conditions subsequent, or the future compliance with law. No mill site entry should be allowed unless it is shown that the conditions of the law have been complied with. (at p. 544)

And, as stated in United States v. Werry, 14 IBLA 242, 81 I.D. 44 (1974), "a vague intention to use the land at some future time does not satisfy the requirements of the statute". (at p. 49).

Two additional factors should be noted. First, the need of a place to live and to keep supplies and equipment or some other use or occupation of a millsite in connection with prospecting or exploration activities aimed at determining what mineral values might exist within associated mining claims does not meet the test laid down in Alaska Copper Company, supra. See United States v. Wedertz, supra. Second, a dependent millsite claim cannot be valid unless it is associated with a valid mining claim. See United States v. Kuretich, 54 IBLA 124 (1981). A mining claim is not valid unless a valuable mineral deposit has been found, and presently exists, within the limits of the claim, i.e., mineralization of sufficient quantity and quality to warrant, as a present fact, a prudent person developing a mine and extracting the mineral. See United States v. Marion, 37 IBLA 68 (1978). The test of the validity of the associated mining claim applies equally to unpatented and patented mining claims. See United States v. Wedertz, supra, and United States v. Werry, supra. It cannot be concluded that a valuable mineral deposit has been found within the Austin-Amazon Group of lode mining claims simply because, in the opinion of the contestees' mining consultant, the facts warrant a continued search for such a deposit.

The six millsite claims that are the subject of this proceeding are found to be invalid because (1) they are not presently used or occupied for mining or milling purposes in connection with the associated lode claims; (2) any use or occupation of the millsite claims has, at best, been, and will in all likelihood for some time in the future be, in connection with prospecting or exploration activities on the associated lode claims; and (3) the evidence establishes that the associated mining claims are not presently valuable for mining purposes, but, at best, are valuable only as an exploration target.

Robert W. Mesch
Administration Law Judge

APPEAL INFORMATION

The contestees, as the parties adversely affected by this decision, have the right of appeal to the Interior Board of Land Appeals. The appeal must be in strict compliance with the regulations in 43 CFR Part 4. (See enclosed information pertaining to appeals procedures.)